

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3817 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

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JABBARKHAN AZADKHAN PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MR MM TIRMIZI for Petitioner  
MR HH PATEL LD AGP for Respondents  
RULE SERVED for Respondent No. 2, 3

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CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 16/12/1999

ORAL JUDGEMENT

1. The Commissioner of Police, Ahmedabad City, Ahmedabad passed an order on 19-3-1999 in exercise of powers under Section 3(1) of the Gujarat Prevention of Antisocial Activities Act, 1985 (PASA Act) detaining the petitioner on the grounds stated in the grounds of detention.

1.2 In the grounds of detention the detaining authority stated that on an earlier occasion, externment orders were passed under Bombay Police Act, on 26-3-1997 against the petitioner. The petitioner committed breach of the said orders and thereafter the petitioner was detained under the PASA Act, by an order dated 29-7-1997. The said order was quashed by the High Court on 13-2-1998. Thereafter again the petitioner was detained under the PASA Act by order dated 18-7-1998 which was again quashed by the High Court on 18-2-1999. The detaining authority took into consideration the two offences registered with Dani Limda Police Station and also considered that although the petitioner was often detained under PASA Act, he has continued his illegal and antisocial activities after being released from detention. The authority considered that the activities of the petitioner are detrimental to public order and therefore, earlier he was detained under PASA on six occasions between 1988 to 1998. All relevant documents in respect of earlier PASA detentions were supplied to the petitioner. Thereafter it is stated that the reference to these detentions is only with a view to indicate background (antecedents) of the petitioner and that it is not considered while passing the order of detention.

1.3. The detaining authority also considered the statements of all three anonymous witnesses whose identity has not been disclosed by the authority in exercise of powers under Section 9(2) of the PASA Act. It recorded subjective satisfaction about the correctness and genuineness of the statements and fear expressed by the witnesses qua the detenu.

2. The detenu challenges the order by this petition on several counts. The main grounds are that there is improper exercise of powers under Section 9(2) of the PASA Act, as the statements of the witnesses were recorded on 15th and 16th March 1999, the same were verified by the detaining authority on 19th March 1999 and the order was passed on that very day by the detaining authority. The detaining authority therefore had no time to consider the material before it and to arrive at a subjective satisfaction for the need for exercise of powers under Section 9(2).

2.1 The second ground is that the detaining authority has taken into consideration the previous orders of detention which came to be quashed by the High Court. It could not have been the basis of the order of detention and therefore the order is vitiated.

3. Mr. Tirmizi has restricted his arguments to the above two grounds. He submitted that in light of the decision of this High Court in the case of Kalidas C. Kahar v. State of Gujarat as reported in 1993(2) GLR 1659 the order and verification on the same day would not provide any time for the detaining authority to consider the need for exercise of power under Section 9(2) and therefore the exercise of powers under Section 9(2) are not based on a satisfaction which could be said to be genuine.

3.1 As regards the second ground Mr. Tirmizi placed reliance on the decision in the case of Chhaganbhai Bhagwanbhai Kahar v. N.L. Kalna as reported in AIR 1989 SC 1234 and submitted that earlier orders of detention which are quashed by the High Court could not have been considered by the detaining authority. Mr. Tirmizi submitted that although it is stated in the grounds of detention that the earlier detentions are not considered and are stated in grounds of detention only with a view to show the background (antecedents), it is only an eye wash and the authority has, in fact, taken into consideration these aspects and acted upon it as well. The order of detention therefore stands vitiated, the petition may be allowed.

4. The detaining authority has filed an affidavit in reply. The broad contentions raised therein are that the petition and the contentions raised therein are not correct. The order is passed after taking into consideration all relevant factors and after arriving at subjective satisfaction for the need to exercise powers under Section 9(2) of the PASA Act. The grounds of detention were formulated by the detaining authority after taking into consideration all these aspects and the order therefore may be upheld. It has been contended that the petitioner is involved in bootlegging activities, his activities are that of a dangerous person and therefore he was required to be detained.

5. During the course of arguments Mr. H.H. Patel, learned. A.G.P. submitted that the petitioner has historic criminal antecedents. He was detained under PASA for as many as six times. On earlier occasions in the year 1997 and 1998 he was detained under PASA Act and on that order being set aside by the High Court, upon his release, he again indulged himself into nefarious activities and at one stage the police was required to open fire. These aspects are reported in newspaper. Mr. Patel categorically stated that earlier detentions have

been taken into consideration by the detaining authority (although the grounds of detention was otherwise). Mr. Patel submitted that because the petitioner, on being released from detention, immediately engaged himself in the nefarious activities, the authority was required to pass this order immediately and therefore passing of order on the same day of verification of the statements may not be taken as non application of mind. This argument of course does not find place in the affidavit in reply. The affidavit in reply does not deal with the aspect of verification and order being on the same date, what factors were considered and what at point of time is not stated in the affidavit in reply. In the affidavit in reply also the detaining authority says that he has not relied upon the earlier detention orders. Mr. Patel therefore submitted that the petition may be dismissed.

6. Considering the rival contentions the first question which requires consideration is, whether there was proper exercise of powers under Section 9(2) of PASA Act claiming privilege.

7. In this regard what transpires is that the statements were verified by the detaining authority on 19-3-1999 and the order was passed on that very day. While doing so the authority recorded subjective satisfaction for exercise of powers under Section 9(2) of the PASA Act.

8. When an authority exercises powers under Section 9(2) of the PASA Act it has to undertake an exercise of satisfying itself about the correctness and genuineness of the fear expressed by the witnesses. For this purpose it is required to be assessed from the material before it and the statements of the witnesses in this regard. The authority has to consider that exercise of this power would have direct bearing on the right of the detenu of making an effective representation. The authority has therefore to strike a balance between the right of the detenu of making a representation on one hand and the public interest on the other. This responsible task is to be performed by the authority after a careful consideration of the material. This would definitely require time. The affidavit-in-reply does not deal with this question at all. The authority has not clarified as to when the proposal was received, at what point of time the statements were verified, what material was considered for exercise of powers under Section 9(2) of the PASA Act, when the orders were prepared and passed. All this exercise was done in one day and in absence of any material coming forward from the detaining authority

in the affidavit in reply, this court is at loss to appreciate as to how the responsible task as stated above was carried out by the detaining authority. In this regard a decision in the case of K.C. Kahar v. State of Gujarat as reported in 1993(2) GLR 1659 may be profitably employed in service. In view of the above decision and facts of the present case, the petition deserves to be allowed on this ground alone.

9. Coming to the second ground, the question whether the detaining authority has relied on the earlier orders of detention and if so whether it could have legally relied upon them will have to be considered.

10. In this regard the court is faced with three versions. First version is from the petitioner that the detaining authority has placed reliance on the earlier order of detention which it could not have done and therefore the order is vitiated. It is contended that a verbal statement by the authority in the grounds of detention that it has not considered the earlier detention orders is only an eye wash. Against this contention of the petitioner there is a statement at the Bar made by Mr. Patel, learned A.G.P. that the detaining authority has taken into consideration the earlier detention orders and because on earlier occasions, on the detention orders being quashed by the court and on the detenu being released, he again indulged into nefarious activities, the detaining authority was required to pass the orders immediately after verification. The third version, that the Court is faced with, is emerging from affidavit in reply filed by the detaining authority as well as the grounds of detention. In these two documents it is contended that the disciplinary authority did not consider the earlier detention orders but reference was made thereto only to indicate the background (the antecedents) of the detenu.

11. Now before going through the factual aspects for deciding whether earlier detention orders were considered or not, let us examine the legal proposition in this regard. If a reference is made to the decision in the case of Chhagan Bhagwan Kahar (supra) it is clearly stated in para 12 that a fortiori when a detention order is quashed by the court issuing a high prerogative writ like habeas corpus or certiorari, the ground of the said order should not be taken into consideration, either as a whole or in part, even along with fresh grounds of detention for drawing the requisite subjective satisfaction to pass fresh order because once the Court strike down an earlier order by issuing Rule, it

nullifies the entire order (emphasis supplied). The detaining authority therefore cannot consider the fact of earlier detention orders and the activities on which such orders were passed once they are struck down by court.

12. Mr. Patel, learned A.G.P. has relied on the decision in case of Kalidas Devji Mali v. Commissioner of Police Vadodara and others 1989(2) GLH 520. It has been held therein that while considering less drastic remedy the subjective satisfaction has to be arrived at by the detaining authority for pursuing remedy under the PASA Act. In such circumstances each case has to be decided on basis of its own facts. In that case the detaining authority had considered the fact that even more than drastic remedy like the earlier preventive detention had no effect on the prejudicial activities of the detenu, the court held that it could not be urged that less drastic remedy was not considered. However, the facts of that case can not be equated with the facts of the present case. In that case the petitioner was detained earlier and was released on expiry of the period of one year on detention. That was not a case, unlike the present case, where the earlier detention orders were struck down by the court of law. In the instant case, the two orders of detention referred by the detaining authority were struck down on 13-2-1998 and 18-2-1999 by this Court. The decision which is relied upon by the learned A.G.P. therefore, cannot be made applicable to the facts of the present case.

13. In view of the above discussion, the legal proposition that emerges is that where an earlier detention order is struck down by a court of law, it gets nullified and cannot form the basis of a successive detention order. The activities on basis of such earlier detention orders were passed cannot be considered by the detaining authority while passing a subsequent detention order.

14. Now, therefore what is required to be seen in the instant case is whether the detaining authority has in fact, taken into consideration the past detentions.

15. The detaining authority comes with a specific case in the grounds of detention as well as in the affidavit in reply that it has not taken into consideration the earlier orders of detention. Learned A.G.P. of course has vehemently argued that the authority has taken into consideration these orders even in the grounds of detention. In an attempt to substantiate his say Mr. Patel has read paragraph No. 2

of the grounds of detention emphatically, while reading the grounds of detention. However, apart from what is contended by the learned A.G.P. the court has to view the case independent of such a statement to arrive at a just conclusion.

16. If the language that is employed in the grounds of detention is considered, it is apparent that from the very beginning the detaining authority had the previous detentions of the detenu in its mind while formulating the grounds of detention and consequently the order of detention. In the very second paragraph it has been stated that the petitioner was earlier detained on two occasions and was released upon quashing of the said order by the High Court. Thereafter the detaining authority states that even thereafter the petitioner has continued to pursue his bootlegging and antisocial activities within the jurisdiction of the Dani Limda Police Station. It is also contended in the later portion of the grounds of detention that as a last resort, often the petitioner was detained under PASA, but has continued his activities on being released from detentions. Further thereafter it is contended in the grounds of detention that such activities of the petitioner are detrimental to public order and therefore he was detained under the PASA on six occasions between 1988 and 1998. All the relevant documents in respect of these detentions are supplied to the detenu. Only at that stage, it is stated that the past detentions are stated in the grounds of detention only to indicate the background (antecedents). The past detentions are not considered in the grounds of detention which may be specifically noted.

17. The same is the contention in the affidavit in reply filed by the detaining authority.

18. It is apparent from the language used in the grounds of detention that the earlier detentions were in the mind of the detaining authority from the beginning and did have an influence on mind of Detaining Authority while passing the order of detention. Although it is categorically stated that it was not considered while passing the order, it did form part of the considerations. This is also reflected from the affidavit in reply. In para 9 the detaining authority states as under:

"Copies of those documents which have been relied upon by me for passing the order of detention against the detenu, have been already supplied to

the detenu..... "

Undisputedly the authority has supplied copies of papers relating to past detentions as can be seen from the grounds of detention. Thus it is clear that past detentions were considered by the detaining authority and therefore the copies are supplied. This it ought not to have considered. It is difficult to contemplate a mental state where certain aspects are in the mind of the authority, namely, past detentions and while passing the order of detention they remain unconsidered by the detaining authority although they find place in the grounds of detention. It is difficult to contemplate two mental compartments one of which would remain inactive while the other activates itself. In the opinion of this court the detaining authority while passing the order of detention, did permit itself to be influenced by past detentions of 1997 and 1998 of the detenu which were quashed by the High Court which is reflected from the fact that the detaining authority referred to past detention of 1997 and 1998 in detail as against other previous detentions which are referred to only passingly. consciously. The reference to 1997 and 1998 detention in detail is in the earlier portion of grounds of detention, whereas reference to six detentions between 1989 and 1998 are at later stage and it is at that stage that it is stated that it is only by way of reference and are not considered while passing the order. The reference to the six past detentions between 1988 and 1998 and reference to the detention of 1997 and 1998 are made separately and distinctly. Reference to the detention 1997 and 1998 is from the beginning in the grounds of detention. The authority also states that often he is detained under PASA but he has still continued his activities on being released from detention. These activities are detrimental to public order and therefore it is necessary to detain the petitioner. All these have to be read together and as a whole. The result is obvious, the Detaining Authority did take into consideration the past detentions which were quashed by High Court. A sentence to the effect that past detentions are stated only by way of history and that they are not considered by the Detaining Authority while passing order can not be read in seclusion and divorced from other contents of the grounds of detention. The past detentions of 1997 and 1998, having been quashed by the High Court, had become irrelevant for exercise of the power of detention. The detaining authority could not have taken them into consideration. In this regard a reference may be made to a decision of this High Court in Special Criminal Application No. 1705 of 1992 rendered on 6-8-1993 by



Division Bench (Coram : S.D.Shah and R.D.Vyas, JJ). There in similar facts, the Court held that Detaining Authority did permit itself to be influenced by a factor which it said was not considered by it and held that non supply of documents relating to that factor vitiated the detention.

19. It is therefore apparent that the authority has taken into consideration the previous detention orders which were quashed by the High Court. Although there are fresh grounds for detention, taking of the previous detention in consideration while passing the order, would vitiate the order, as the Supreme Court in the case of C.B.Kahar v. N.L.Kalna (supra) has stated that such grounds should not be taken into consideration either as a whole or in part even along with fresh grounds of detention for drawing requisite subjective satisfaction.

20. On the above grounds, the petition deserves to be allowed and the same is allowed. The order of detention passed by Commissioner of Police, Ahmedabad City, Ahmedabad on 19-3-1999 detaining the petitioner Jabbarkhan Azadkhan Pathan is hereby quashed and set aside. The petitioner-detenu Jabbarkhan Azadkhan Pathan of 1/30, Opp. Ganj Shaheed Darga, Dani Limda, Ahmedabad be set at liberty forthwith if not required in any other case, Rule is made absolute. No. costs.

(A.L. Dave, J)